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No. 86-1280

In the Supreme Court of the United States

OCTOBER TERM, 1986

STATE OF TENNESSEE, PETITIONER

v.

JOHN HERRINGTON, SECRETARY OF ENERGY

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SIXTH CIRCUIT

BRIEF FOR THE RESPONDENT IN OPPOSITION

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QUESTION PRESENTED

1. Whether the court of appeals had original and exclusive jurisdiction over this action alleging that the Secretary of Energy has failed to comply with the requirements of 42 U.S.C. 10161(h).

2. Whether 42 U.S.C. 10161(h) requires the Secretary of Energy to "consult and cooperate" with petitioner prior to receiving authorization from Congress to construct a monitored retrievable storage facility.

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OPINIONS BELOW

The opinion of the court of appeals (Pet. App. A1-A25) is reported at 806 F.2d 642. The opinions of the district court (Pet. App. A26-A42, A43-A75) are reported at 622 F. Supp. 923 and 626 F. Supp. 1345.

JURISDICTION

The judgment of the court of appeals was entered on November 25, 1986. A petition for rehearing was denied on December 31, 1986. By order of January 7, 1987 (Pet. App. A88), the court of appeals stayed the issuance of its mandate until February 7, 1987. The petition for a writ of certiorari was filed on February 5, 1987. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In subchapter I of the Nuclear Waste Policy Act of 1982 (NWPA), 42 U.S.C. 10121-10171, Congress enacted a comprehensive program for disposing of this nation's

high level nuclear waste and spent fuel. Part A of Subchapter I establishes a program for constructing permanent deep geologic repositories, where high level radioactive waste and spent fuel may be stored permanently. 42 U.S.C. 10131-10145. Part B of the subchapter establishes an interim storage program, where such waste and fuel may be stored on a temporary basis. 42 U.S.C. 10151-10157. And Part C of the subchapter establishes a so-called "monitored retrievable storage" (MRS) program, where nuclear waste may be processed, packaged, and stored pending shipment to a permanent deep geologic repository. 42 U.S.C. 10161.

Parts A and B of Subchapter I actually authorize the Secretary of Energy to begin developing and siting deep geologic and interim storage facilities. See 42 U.S.C. 10131(b), 10151(b). In contrast, Part C merely authorizes the Secretary to "complete a detailed study of the need for and feasibility of, and [to] submit to the Congress a proposal for, the construction of one or more monitored retrievable storage facilities" (42 U.S.C. 10161(b)(1)).[1] Only if Congress authorizes such an MRS facility may the Secretary actually proceed with development and construction. 42 U.S.C. 10161(c)(2).

In anticipation of such congressional approval, however, Part C further establishes the procedures which the Secretary must follow in developing and constructing such an MRS facility. See 42 U.S.C. 10161(c)-(h). The Secretary must comply with the requirements of the National Environmental Policy Act of 1969. 42 U.S.C. 10161(c). He must obtain a license from the Nuclear Regulatory Commission (NRC). 42 U.S.C. 10161(d) and

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[1] In formulating this proposal, the Secretary is instructed to consult with the Nuclear Regulatory Commission and the Administrator of the Environmental Protection Agency. 42 U.S.C. 10161(b)(3). Moreover, the statute specifies certain minimum subjects that must be covered and included in the Secretary's study and proposal. See 42 U.S.C. 10161(b)(2), (3), and (4).

(e). He must provide "impact aid" to affected units of local government. 42 U.S.C. 10161(f). He must not construct an MRS facility in any state where a deep geologic repository has been approved for siting. 42 U.S.C. 10161(g). And, for "[a]ny facility authorized pursuant to" this section of the statute, the Secretary must comply with certain provisions applicable to deep geologic repositories, including the requirement that he engage in a statutorily defined process of "consultation and cooperation" with affected states. 42 U.S.C. 10161(h).[2]

2. Following NWPA's passage, the Secretary, pursuant to the directive in Part C of Subchapter I, undertook to study the need for and feasibility of construction of an MRS facility. Pet. App. A5. When completed, the study indicated that construction of an MRS facility would in fact significantly improve the operation of the nation's nuclear waste management system. *Ibid.* The Secretary thus began screening and identifying potential sites on which he could construct an MRS facility. *Ibid.* After comprehensive analysis, the Secretary identified three locations in the State of Tennessee where an MRS facility could be constructed, and specified the Clinch River Breeder Reactor site as the most preferable of the three. *Id.* at A5-A6; see also *id.* at A5 n.4.

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[2] Specifically, 42 U.S.C. 10161(h) provides that:

> Any facility authorized pursuant to this section shall be subject to the provisions of sections 10135, 10136(a), 10136(b), 10136(d), 10137, and 10138 of this title. For purposes of carrying out the provisions of this subsection, any reference in sections 10135 through 10138 of this title to a repository shall be considered to refer to a monitored retrievable storage facility.

Sections 10137(b) and (c) require the Secretary to engage in a process of "consultation and cooperation" with state and tribal governments directly affected by the siting of a deep geologic repository.

Therefore, on April 25, 1985, the Secretary notified the Governor of the State of Tennessee that he had tentatively determined to recommend to Congress that an MRS facility be constructed in that state. Pet. App. A6. The Secretary advised the Governor that he would finish evaluating the three candidate sites over the ensuing months and submit a final proposal to Congress by January 15, 1986. *Ibid.* He offered to and subsequently did provide the State with funds and technical assistance for evaluating the effects that the proposed MRS facility would have on the locale. *Id.* at A6-A7. Finally, he asked that the State submit to him by July 1, 1985, any comments it might have concerning the tentative MRS proposal so that those comments could be timely analyzed and included in his report to Congress. *Id.* at A7.[3]

3. In August 1985, however, petitioner, the State of Tennessee, commenced this lawsuit in the United States District Court for the Middle District of Tennessee, complaining that, in identifying Tennessee as a candidate for an MRS facility, the Secretary had failed to follow the "consultation and cooperation" process mandated by the statute.[4] Pet. App. A7-A8. Moreover, because the district court's subject matter jurisdiction over this action was in doubt, petitioner filed a petition for review—identical to its complaint in the district court—with the United States Court of Appeals for the Sixth Circuit. *Id.* at A8. In both the complaint and the petition for review, petitioner asked that the Secretary be enjoined from presenting his MRS proposal to Congress. *Ibid.*

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[3] Tennessee did not officially transmit its position to the Secretary until February 5, 1986. Pet. App. 7A.

[4] Petitioner also alleged that the MRS authorization process is unconstitutional. See Pet. App. A8 n.5. But petitioner did not further pursue this allegation in either of the courts below. See *ibid.*

The district court determined that it had subject matter jurisdiction over the complaint (Pet. App. A26-A42) and that the Secretary had failed to follow the "consultation and cooperation" process mandated by the statute (*id.* at A43-A75).[5] The court found that "the [consultation and cooperation] provisions incorporated in [42 U.S.C. 10161(h)] are capable of application both before and after Congressional authorization" (*id.* at A65), that "Congress clearly intended for the states to play an active role in the MRS siting process" (*id.* at A66), and that, "[i]f the provisions of [42 U.S.C. 10161(h)] were to take effect only after Congressional authorization of an MRS facility, the state's rights to participate in consultation and cooperation procedures * * * would be rendered meaningless" (*id.* at A70). Accordingly, it issued "a declaratory judgment that the provisions of [42 U.S.C. 10161(h)] take effect prior to the time of congressional authorization of the construction of an MRS facility" (*ibid.*) and, subsequently, enjoined the Secretary " 'from making any proposal to Congress or filing any documents with Congress which rely on siting studies developed prior to consultation and cooperation between [the Secretary] and the State of Tennessee' " (Pet. 6 n.5, quoting *Tennessee* v. *Herrington,* No. 3-85-0959 (M.D. Tenn. Feb. 7, 1986)).[6]

4. The court of appeals reversed (Pet. App. A1-A25). It held that original jurisdiction to review the Secretary's actions under the MRS provisions of the statute lies in the appellate courts (*id.* at A11-A17). And it held that the

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[5] The district court authorized an interlocutory appeal of its jurisdictional ruling. Pet. App. A8. The Sixth Circuit later consolidated that appeal with both the petition for review and the Secretary's appeal from the district court's judgment on the merits. *Id.* at A8, A9.

[6] The Secretary had planned to submit his proposal to Congress, together with petitioner's comments, on February 10, 1986.

Secretary has no obligation to "consult and cooperate" with petitioner since Congress has not yet authorized the construction of any MRS facility (*id.* at A17-A22).

On the jurisdictional question, the court acknowledged that "NWPA's provisions on judicial review are unclear" (Pet. App. A9). The court noted that 42 U.S.C. 10139(a), which gives the courts of appeals original jurisdiction over civil actions alleging that the Secretary has failed to take statutorily required action, on its face applies "only to actions arising under Subchapter I, Part A" (*id.* at A10).[7] But the court further noted that 42 U.S.C. 10161(h) "makes certain sections * * * of Part A dealing with review of site selection and state and Indian tribe participation and consultation in the permanent repository context applicable to MRS facilities as well" (*ibid.* (footnote omitted)), and that "Congress clearly intended that the development of the MRS proposal proceed in as timely a fashion as the development of the permanent repository [process]" (*id.* at A13). Thus, it concluded "that actions arising under section 10161(h) of the NWPA are subject to the judicial review provisions of section 10139," which meant that original jurisdiction lay in the appellate court (*id.* at A17).

On the substantive question, the court found that "none of the provisions listed in section 10161(h), including section 10137(b), [which creates the consultation and cooperation requirement], becomes applicable until the MRS facility has been 'authorized' " (Pet. App. A19).

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[7] 42 U.S.C. 10139(a) provides, in pertinent part, that "the United States courts of appeals shall have original and exclusive jurisdiction over any civil action * * * alleging the failure of the Secretary * * * to take any action, required under this part." Part A, the "part" to which this provision refers, technically encompasses only 42 U.S.C. 10131-10138 (and not 42 U.S.C. 10161).

Therefore, the court noted, "[t]his litigation centers around the meaning of that term" (*ibid.*). But it further found that the "meaning of section 10161(b) * * * is 'susceptible of contradictory interpretations' " (Pet. App. A20 (citation omitted)). While "the word 'authorized' was used in six other instances in section 10161, and * * * in each case it referred to *congressional* authorization of an MRS facility" (*ibid.* (emphasis in original)), the court found that the "legislative history of the NWPA does not reveal the meaning that Congress intended to give 'authorized' " in 42 U.S.C. 10161(h) (Pet. App. A21).

Rather, the court determined, "the Act and its legislative history suggest that Congress had two conflicting goals: it wanted to provide the states with a meaningful role in the development of disposal facilities, but * * * it also wanted to ensure the timely development of an MRS proposal" (Pet. App. A21). "Adoption of the State's position," the court then noted, "would defeat the second goal, though it would further the first" (*ibid.*). Conversely, the court added, the Secretary's interpretation "would further the second goal, while impeding the first" (*ibid.*).

In these circumstances, the court concluded, it must "adopt the [Secretary's] position" (Pet. App. A21). That position rationally furthers the second goal of the statute, to wit, the timely development of an MRS proposal (*ibid.*). Moreover, while that "interpretation does give the State a more constricted role than the State would prefer" (*id.* at A22), it "does not totally deprive the State of its role in the MRS siting process, since the provisions set forth in section 10161(h) will apply when and if Congress approves the MRS facility" (*ibid.*). Thus, mindful of this Court's admonition concerning the deference due an agency's construction of the statute it administers, the court upheld the Secretary's "interpretation of 'authorized' in section 10161(h) as meaning 'authorized by Congress' " (Pet. App.

A22, citing *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984)).[8]

5. The court then denied petitioner's suggestion of rehearing en banc. See Pet. 8. It agreed, however, to stay issuance of its mandate pending the filing of a petition for a writ of certiorari and the petition's disposition by this Court. Pet. App. A88. Accordingly, the Secretary remains enjoined from transmitting his proposal to Congress.

ARGUMENT

The decision below is correct. It does not conflict with any decision of this Court or of any other court of appeals. Accordingly, review by this Court is not warranted.

1. Petitioner first suggests, albeit without argument (Pet. ii, 13), that the court below erred in holding that it had original jurisdiction over this suit alleging a violation of 42 U.S.C. 10161(h). But, as the court below noted (Pet. App. A14), "[t]he provisions listed in section 10161(h) are clearly subject to the original jurisdiction of the courts of appeals when they are being applied to repositories," and "Congress must have intended the same jurisdictional provisions to apply to both permanent repositories and MRS." To hold otherwise would attribute "an irrational bifurcated system" to Congress. (*Crown Simpson Pulp Co.* v. *Costle*, 445 U.S. 193, 197 (1980) (footnote omitted)). Thus, every court that has considered the question has rejected petitioner's position. See *General Electric Uranium Mgmt. Corp.* v. *United States Dep't of Energy*,

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[8] Judge Wellford concurred in part and dissented in part (Pet. App. A23-A25). He agreed that the court of appeals had original jurisdiction over actions concerning 42 U.S.C. 10161(h). Pet. App.A23, A24. But he believed that interpreting that section to require "consultation and cooperation" only after Congress authorizes MRS development "limits the state to such a restricted role that this interpretation is unreasonable and unacceptable in light of expressed legislative intent and other statutory language" (*id.* at A24-A25).

764 F.2d 896 (D.C. Cir. 1985); *Wisconsin Electric Power Co.* v. *Department of Energy*, 778 F.2d 1 (D.C. Cir. 1985). This Court has no reason to question the unanimous judgment of those courts, particularly in the present case where, because a petition for review was concurrently filed with the court below, only the form of the court's order—and not the substantive result—is affected by that issue.

2. On the merits, petitioner contends (Pet. 9-12) that the court below misapplied the interpretive principles announced in *Chevron U.S.A. Inc.* v. *Natural Resources Defense Council, Inc.*, 467 U.S. 837 (1984). This contention is insubstantial.

In *Chevron*, this Court articulated the standards by which courts should review "an agency's construction of the statute which it administers" (467 U.S. at 842). First, the Court noted, "is the question whether Congress has directly spoken to the precise question at issue. If the intent of Congress is clear, that is the end of the matter; for the court, as well as the agency, must give effect to the unambiguously expressed intent of Congress" (*id.* at 842-843 (footnote omitted)). If, however, "Congress has not directly addressed the precise question at issue, the court does not simply impose its own construction on the statute" (*id.* at 843 (footnote omitted)). Rather, the Court admonished, "the question for the court is whether the agency's answer is based on a permissible construction of the statute" (*ibid.*).

The court below followed these principles to their letter. First, it asked whether Congress had directly spoken to the precise question at issue. Pet. App. A20. It determined that Congress has not done so (*id.* at A20-A21), finding that "the meaning of section 10161(h) is * * * 'susceptible to contradictory interpretations' " (*id.* at A20 (citation omitted)). Accordingly, the court asked whether the agency had adopted a permissible answer to the question and

found, on the basis of careful consideration, that indeed the agency had done so (*id.* at A21-A22). This is exactly the analytic process that *Chevron* requires.

Petitioner's claim (Pet. 10) that the court's decision leaves it without meaningful input into the design and implementation of the MRS program is plainly wrong. To begin with, petitioner remains completely free to provide Congress with any information that it deems relevant to the MRS siting process; Congress is the body that will determine whether and, if so, where the MRS program will go forward. Second, when and if Congress authorizes the construction of an MRS facility, petitioner remains free to participate in the environmental impact assessment and nuclear licensing processes. See 42 U.S.C. 10161(c)-(e). Third, when and if Congress authorizes construction of an MRS facility, petitioner remains free to engage in the full consultation and cooperation process described in 42 U.S.C. 10137(b) and (c).[9] Indeed, the only thing petitioner may not do is play a formal editorial role in the development of the Secretary's MRS proposal. While this "interpretation does give the State a more constricted role than the State would prefer" (Pet. App. A22), it simply does not, as petitioner claims, leave the state without opportunity for meaningful input.

Petitioner's claim (Pet. 11-12) that the court's decision ignores a clear legislative intent fully to involve the states in the MRS process prior to congressional authorization is equally unfounded. For one thing, the most reliable in-

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[9] To be sure, petitioner may not engage in formal "consultation and cooperation" concerning the sites which the Secretary will identify as suitable for MRS construction. But petitioner can "consult and cooperate" *with Congress* concerning whether and where an MRS facility actually should be constructed. This opportunity for consultation and cooperation with Congress is *not* available in the deep geologic repository program (see page 2, *supra*), since Congress has already authorized construction of such a facility and left the siting decision to the Secretary.

dicator of congressional intent is the language of the statute and, as both courts below found, "the word 'authorized' was used in six other instances in section 10161, and * * * each [time] it refer[s] to *congressional* authorization of an MRS facility" (Pet. App. A20 (emphasis in original)). Second, as the court below also found, the "legislative history of the NWPA does not reveal the meaning that Congress intended to give 'authorized' " in 42 U.S.C. 10161(h) (Pet. App. A21).[10] And, finally, the MRS provisions plainly have competing goals: "to provide the states with a meaningful role in the development of disposal facilities * * * [and] to ensure the timely development of an MRS proposal" (*ibid.*). Petitioner's narrow characterization of congressional intent (as being principally concerned with state consultation and cooperation) is inconsistent with the other expressed goal of Congress.

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[10] Petitioner's citation (Pet. 11 n.11) to the remarks of Sen. McClure does not support its claim that Congress intended that the Secretary would formally consult the state in developing his MRS *proposal*. Sen. McClure directed his remarks to the MRS *program* and, prior to congressional authorization, there simply is no MRS *program*. Rather, the Secretary is to submit a *proposal* concerning "the establishment of a Federal *program* for the siting, development, construction, and operation * * *" of MRS facilities. § 141(b)(2)(A), 42 U.S.C. 10161(b)(2)(A) (emphasis added). Thus, Sen. McClure's comments actually support the Secretary's interpretation that state consultation rights are not triggered until Congress has authorized construction of an MRS facility, pursuant to an approved program.

CONCLUSION

The petition for a writ of certiorari should be denied.
Respectfully submitted.

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